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Koh Keng Guan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–23 OF 2004
LOW HOP BING, ABDULL HAMID EMBONG AND AHMAD MAAROP JJCA
20 JULY 2009

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Criminal Law — Dangerous drugs — Trafficking — Heroin packages bandaged to appellant's body — Whether appellant innocent carrier or had knowledge and possession of drugs — Whether appellant had plausible explanation for act — Whether appellant acted under threat or duress

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The appellant was convicted and sentenced to the death by the High Court for trafficking in 1,836g heroin pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He appealed to the Court of Appeal against the decision. According to the prosecution's case, the appellant was at the Kuala Lumpur International Airport to board a flight to Frankfurt. During the security check

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prior to the flight, the alarm went off when the appellant entered two 'walk-through' detectors. A body frisk by the security personnel revealed some hard items on the appellant's legs. When asked what they were, the appellant replied that his legs were blistered. Unconvinced with his explanation, the personnel took him to the security room, where, on lifting the appellant's

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trouser legs, they saw bandages on his calves. The appellant refused to allow the security personnel to remove the bandages. He was then taken to the police base where he was directed to remove his trousers. The security personnel found the appellant's thighs and calves were wrapped in bandages. There were three plastic packages bandaged on each thigh and one plastic package on each

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calf. The eight packages contained a total 1,836g heroin. In his defence at the trial the appellant said he was an innocent carrier and acted under duress and threat to himself and his family. He said he had no knowledge he was carrying heroin.

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Held, dismissing the appeal and affirming the decision of the High Court:

(1) The eight packages of heroin were concealed on the appellant's person. He lied that his legs were blistered and he refused to allow PW1 (one of the security personnel) to open the bandages or remove them for

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examination. In the absence of any plausible or reasonable explanation by the appellant, these facts were sufficient for the trial court to make an affirmative inference and finding that he had knowledge of the heroin and that he was in actual possession of it (see para 16).

(2) The High Court correctly held that the appellant had actual possession of

the heroin and that the weight of the heroin, being in excess of the statutory trigger of 15g, had activated the presumption of trafficking under s 37(da)(i) of the DDA (see para 17).

(3) There was no evidence to show the appellant was under any threat to lead to his apprehension of instant death or (harm) to his life or limb. The defence of threat was devoid of merit (see para 20).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar heroin sejumlah 1,836g berikutan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dia merayu ke Mahkamah Rayuan terhadap keputusan tersebut. Mengikut kes pendakwaan, perayu berada di Lapangan Terbang Antarabangsa Kuala Lumpur untuk menaiki pesawat ke Frankfurt. Semasa pemeriksaan sekuriti sebelum penerbangan, penggera berbunyi apabila perayu memasuki dua pengesan-pengesan 'walk-through'. Pemeriksaan badan dilakukan oleh pegawai sekuriti menunjukkan beberapa barang keras berada di bahagian kaki perayu. Apabila ditanya apakah ia, perayu menjawab bahawa kakinya melecet. Tidak percaya dengan penjelasannya, pegawai-pegawai tersebut membawa dia ke bilik sekuriti, di mana, selepas mengangkat seluar perayu, mereka nampak pembalut atas betis-betisnya. Perayu tidak membenarkan pegawai-pegawai sekuriti tersebut menanggalkan pembalut-pembalut tersebut. Dia kemudiannya dibawa ke pangkalan polis di mana dia diarahkan untuk menanggalkan seluarnya. Pegawai-pegawai sekuriti tersebut mendapati peha dan kaki perayu dibalut dengan pembalut-pembalut. Terdapat tiga paket plastik dibalut atas setiap peha dan satu paket plastik atas setiap betis. Kelapan-lapan paket mengandungi heroin yang jumlah keseluruhan 1,836g. Dalam pembelaannya semasa perbicaraan, perayu menyatakan yang dia adalah pembawa tidak salah dan bertindak di bawah dures dan ancaman kepada dirinya dan keluarganya. Dia berkata yang dia tidak mempunyai pengetahuan yang dia membawa heroin.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Kelapan-lapan paket heroin adalah disembunyikan atas diri perayu. Dia berbohong yang kakinya melecet dan tidak membenarkan PW1 (salah seorang daripada pegawai sekuriti) untuk membuka pembalut atau menanggalkan ia untuk pemeriksaan. Dalam ketiadaan apa-apa penjelasan yang boleh dipercayai atau munasabah daripada perayu, fakta ini adalah mencukupi untuk mahkamah perbicaraan membuat inferens afirmatif dan mendapati bahawa dia mempunyai pengetahuan mengenai heroin dan dia sebenarnya memilikinya (lihat perenggan 16).

(2) Mahkamah Tinggi secara betul memutuskan bahawa perayu mempunyai milikan sebenar heroin dan bahawa berat heroin, melebihi pencetus

A statutori 15g, telah mengaktifkan anggapan mengedar di bawah s 37(da)(i) ADB (lihat perenggan 17).

(3) Tidak terdapat keterangan menunjukkan perayu di bawah apa-apa ancaman untuk membawa dia kepada anggapan kematian segera atau (mudarat) kepada nyawanya atau kakinya. Pembelaan ancaman tidak B mempunyai merit (lihat perenggan 20).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274. C

Cases referred to

Chan Pean Leon v Public Prosecutor [1956] MLJ 237 (refd)
Emmanuel Yaw Teiku v Public Prosecutor [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd) D
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
Roslan bin Sabu @ Omar v PP [2006] 5 MLJ 244; [2006] 4 AMR 772, CA (refd) E
Syed Ali Syed Abdul Rahman v PP [1982] 1 MLJ 132; [1982] CLJ (Rep) 340, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

F **Legislation referred to**

Dangerous Drugs Act 1952 ss 37(da)(i), 39B(1)(a), 39B(2)
Evidence Act 1950 s 105
Penal Code s 94

G *RV Lingam (RV Lingam & Co) for the appellant.*
Nurulhuda Nur'aini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

H APPEAL

[1] The appellant ('the accused') was charged with the offence of trafficking in heroin, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 I and punishable under s 39B(2) thereof (unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952).

[2] He was convicted and sentenced to death by the Shah Alam High Court.

This is his appeal against the conviction and sentence.

FINDING OF FACTS

[3] After a full trial, the narrative of facts as found by the learned trial judge unfolded that on 17 October 2000, at about 9pm, a security assistant ('PW1') was on duty at Gate C1 and Gate C3, Satellite Building, Kuala Lumpur International Airport, together with another colleague ('PW8') and one Ramly. At about 10.10pm, PW1 was at Gate C3 to carry out security checks on passengers boarding flight MH006 from Kuala Lumpur to Frankfurt.

[4] At about 10.40pm, the accused went through the first 'walk-through detector', which then triggered an alarm. PW8 directed the accused to go through the second 'walk-through detector', which also triggered an alarm. With the accused's permission, PW1 carried out a body check, by frisking the accused's body with his (PW1's) hands. Upon touching some hard items on the accused's legs, PW1 asked the accused what the hard items were. The accused replied that his legs were blistered. PW1 told PW8 that the accused's explanation was not convincing. Both PW1 and PW8 then led the accused to the security room. PW1 lifted the accused's trousers and saw, on the accused's calves, some bandages. The accused refused to allow PW1 to remove the bandages. PW1 and PW8 accompanied the accused to the police base. On the way, PW1 stopped at the Immigration Department, located in the building, to enable Immigration personnel to make the necessary endorsement on the accused's passport. The accused was not allowed to leave Kuala Lumpur for Frankfurt. The 'exit' stamp of the immigration, endorsed earlier on the accused's passport, was duly re-endorsed 'void'.

[5] At the police base, PW1 directed the accused to remove his trousers, whereupon PW1 found that the accused's thighs and calves were wrapped in bandages. There were three plastic packages bandaged on each thigh, and one plastic package on each calf. PW1 seized the accused's air ticket, boarding pass and passport. The chemist ('PW6') confirmed that, on analysis, all the eight packages contained a total of 1,836g of heroin.

[6] In his defence, the accused testified that he was an innocent carrier, acting under duress and threat to himself and his family with no knowledge of what he was carrying and he did that at the behest of one Ah Hai.

KNOWLEDGE AND INNOCENT CARRIER

[7] Learned defence counsel Mr RV Lingam submitted that the accused had no knowledge of the heroin, which the accused thought was medicine, and so the accused was an innocent carrier.

A **[8]** The stand taken by learned deputy public prosecutor Ms Nurulhuda Nur'aini bt Mohd Noor is that the accused was not an innocent carrier, as the prosecution had discharged the burden of proving knowledge and actual possession against him.

B **[9]** In our view, the immediate question that must be answered under this head is whether the learned judge was correct in finding that the accused had possession and knowledge of the contents of the eight packages bandaged to his thighs and calves.

C **[10]** In *Leow Nghee Lim v Reg* [1956] MLJ 28, Taylor J had the occasion to consider the meaning of possession of chandu. He was in the view that:

(a) The most helpful definition of possession is 'the relation of a person to a thing over which he may at his pleasure exercise such control as to the
D character of the thing admits, to the exclusion of other persons'. This definition includes some element of knowledge of the existence of a chattel and some idea of its whereabouts before he can exercise any control over it, thereby importing mens rea as an essential element; and

E (b) How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances: see also *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597; at p 605 (FC).

F **[11]** In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; at pp 238–240 (HC), Thomson J (later LP) explained the meaning of the word 'possession' in the context assisting in the carrying on of a public lottery under s 41(1)(c) of the Common Gaming Houses Ordinance (now Act) 1953. He propounded that:

G (a) There can be no possession without knowledge, as an essential ingredient of all possession is that there must be an intention to exercise the power of disposal in case of need to exercise that power to the exclusion of other persons; and

H (b) There are therefore two elements viz a physical element which may be proved by direct evidence; and a mental element or *animus possidendi* ie intention, which in the nature of things, cannot be proved by direct evidence, but by inference from the surrounding circumstances, and it is impossible to lay down any general rule.

I **[12]** The accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question; and in order to arrive at a finding of knowledge, the court will have to consider the totality of the evidence, including the explanations and denials made by the accused

and his conduct on the occasion in question: see *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, 590C–D left per Lim Beng Choon J (as he then was).

[13] In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL), at pp 375I–376A, the House of Lords pointed out that:

(a) If the accused had a suspicion but deliberately shut his eyes, the court is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. This would not lead to an unreasonable result: per *Lord Reid at p 367E–F*.

(b) If someone deliberately assumes control of some package or container, then he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would not be rational to hold that someone, who is in possession of a box which he knows to have things in it, is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, he would nevertheless be in possession of them: per *Lord Morris at pp 375I–376A*.

(c) In all cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — of possession. It calls for an explanation. The explanation will be heard and the jury (in Malaysia, the court) must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession: per *Lord Wilberforce at 394E* (Words in bracket added).

[14] The above propositions were affirmed by the Federal Court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, in considering the issue of knowledge as a necessary element to establish possession per *Arifin Zakaria* FCJ (now CJ (Malaya)).

[15] Illustration of the inference of knowledge include:

(a) *Emmanuel Yaw Teiku* , where 515.7g of heroin were found in the stomach

of the accused who initially refused to undergo the X-ray procedure. The Federal Court held that this indicated the accused's knowledge of what was inside his body;

(b) *Roslan bin Sabu @ Omar v Public Prosecutor* [2006] 5 MLJ 244; [2006] 4 AMR 772 (CA), where the accused was carrying the two transparent plastic carrier bags with glaring sight of the drugs, and the plastic wrappers were transparent, thereby fulfilling the element of knowledge ie mens rea to constitute possession on the part of the accused;

(c) *Teh Hock Leong v Public Prosecutor*, Court of Appeal Criminal Appeal No B-05–84 of 2003 (CA), where the method employed by the accused to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities; and

(d) *Syed Ali Syed Abdul Rahman & Anor v Public Prosecutor* [1982] 1 MLJ 132; [1982] CLJ (Rep) 340 at p 346 (FC), where the representation the accused made to a prosecution witness therein regarding the purpose of borrowing the car was a deliberate lie; such lie was held to be a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[16] In the instant appeal, it is significant to state that the accused was found to have eight packages strapped to his thighs and calves. They were concealed on the person of the accused. He had lied that his legs were blistered and refused to allow PW1 to open the bandages or remove them for examination. In the absence of any plausible or reasonable explanation by the accused, these facts are sufficient for the trial court to make an affirmative inference and finding that the accused had knowledge of the enormous quantity of heroin and that he was in actual possession of the proscribed drug ie heroin.

[17] As the prosecution had proved the accused's actual possession of 1,836g of heroin, and the weight thereof far exceeded the statutory trigger of 15g, the presumption of trafficking as provided in s 37(da)(i) is activated against the accused. We are of the view that the High Court had correctly held that the accused was in actual possession of the heroin and that the weight in question being in excess of the statutory trigger had effectively activated the presumption of trafficking pursuant to s 37(da)(i).

THREATS

[18] The next and final issue raised for the accused is the defence of threats. This defence must be considered by reference to s 94 of the Penal Code which states:

94 Act to which a person is compelled by threats

Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequences:

Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

[19] The simple and straightforward question for determination under this head is whether there is any evidence to sustain the applicability of this defence. Under s 105 of the Evidence Act 1950, the burden is on the accused to establish the defence.

[20] Upon a careful consideration of this issue, we are unable to find any iota of evidence to show that the accused was under any threat to lead to his apprehension of instant death or to his life or limb. We have no difficulty in dismissing this defence as it is devoid of merits.

CONCLUSION

[21] The learned judge has not erred in his finding, beyond reasonable doubt, that the accused had actual possession of the eight plastic packages and the dangerous drugs, and that the accused had not rebutted the presumption of trafficking under s 37(da)(i). Hence, we dismissed the accused's appeal and affirmed the entire decision of the High Court.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar